

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ANA MABEL RIVERA-GARAY
Claimant

VS.

MCCRITE PLAZA RETIREMENT COMMUNITY
Respondent

AND

KS. HEALTHCARE ASSOC. WC INS. TRUST
Insurance Carrier

Docket No. 1,000,191

ORDER

Claimant requests review of the May 25, 2006 preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict.

ISSUES

Claimant filed a post-award request for temporary total disability benefits (TTD) through the use of an E-3, more commonly known as an Application for Preliminary Hearing. The Administrative Law Judge (ALJ) found that there was "not jurisdiction to treat the [claimant's] request for TTD benefits via a preliminary hearing, as the granting of such benefits will require a re-computation of the Award, and should be handled as a review and modification hearing."¹ Thus, he declined to award the post-award TTD sought by claimant.

The claimant requests review of the ALJ's Order and frames the dispute at issue as follows:

- I. Whether the Administrative Law Judge exceeded his jurisdiction by finding that he did not have jurisdiction to rule on claimant's properly filed

¹ ALJ Order (May 25, 2006).

Preliminary Hearing application for temporary total disability during medical treatment pursuant to K.S.A. 44-534a.

- II. Whether the Administrative Law Judge exceeded his jurisdiction by finding that if he ordered temporary total disability that may in fact be back due as of the date of the Preliminary Hearing, that temporary total disability was not the subject to order based on respondent's assertion that the payment of temporary total would require recalculation of the Award.
- III. Whether the ALJ exceeded his jurisdiction in failing to admit claimant's medical evidence on the issue of temporary total disability under K.S.A. 44-534a. [and]
- IV. Whether the matter should be remanded to the Administrative Law Judge for a Preliminary Hearing on the issue of temporary total disability under K.S.A. 44-534a.²

Respondent maintains the Board does not have jurisdiction to review the issues raised by claimant at this juncture of the proceedings. And even if jurisdiction is proper, based upon an allegation that the ALJ exceeded his jurisdiction, the ALJ has wide latitude in conducting post-award hearings and did not, in this instance, exceed that jurisdiction. Rather, the ALJ's decision "makes good policy sense"³ in that it avoids unnecessarily repetitive hearings.

There is apparently no dispute that claimant is temporarily and totally disabled. Rather, the dispute stems from the procedural posture of this case. Claimant seeks TTD benefits that if granted, will compel a re-computation of her Award. But before the Board can address that issue, the Board must first determine whether it has jurisdiction over the ALJ's finding that he has no jurisdiction to determine such an issue at a preliminary hearing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant was awarded a 49 percent work disability on February 24, 2003. After the Award was entered, claimant requested and received additional post-award medical treatment. During the course of that treatment which was ultimately voluntarily provided, claimant was temporarily and totally disabled from September 29, 2005 to June 7, 2006. When TTD benefits were not forthcoming, claimant filed an application for hearing and a

² Claimant's Brief at 3 (filed June 16, 2006).

³ Respondent's Brief at 3 (filed July 6, 2006).

hearing was held on May 24, 2006. At the hearing, respondent's counsel argued that the ALJ had no authority or jurisdiction to entertain claimant's request because claimant's claim was already the subject of an Award. And if any further TTD benefits were awarded, the Award would necessarily have to be re-computed. Thus, what claimant should properly do is file a request to Review and Modify the Award rather than proceed in the preliminary hearing forum. Consistent with this argument, respondent objected to claimant's evidence, which included statements from physicians as to claimant's work status, contending that the evidentiary elements required by K.S.A. 44-519 were not met.

After some consideration, the ALJ agreed with respondent's position and refused to admit claimant's evidence and denied claimant's request, reasoning that he had no jurisdiction. Instead, claimant was directed to file a request for a review and modification.

As noted above, before the Board can address the claimant's arguments, the Board must first consider whether it has jurisdiction over this matter and further consider the underlying framework of the Kansas Workers Compensation Act (Act).

In construing a specific statute in the Act, the legislative intent is determined from considering the entire Act.⁴ The Kansas Supreme Court has held that an important objective of workers compensation law is avoiding cumbersome procedures and technicalities of pleading so that a correct decision may be reached by the shortest and quickest possible route.⁵ The Division of Workers Compensation is not bound by technical rules of procedure, but should give the parties a reasonable opportunity to be heard and to present evidence, to insure an expeditious hearing, and to act reasonably and without partiality.⁶

K.S.A. 44-523 provides in part that the director or court in a workmen's compensation proceeding shall not be bound by technical rules of procedure, and that they shall act reasonably and without partiality. **The fair implication therefrom is that any procedure which is appropriate and not prohibited by the workmen's compensation act may be employed.**⁷ (Emphasis added.)

⁴ *McGranahan v. McGough*, 249 Kan. 328, 820 P.2d 403 (1991).

⁵ *Pyeatt v. Roadway Express, Inc.*, 243 Kan. 200, 756 P.2d 438 (1988).

⁶ K.S.A. 44-523(a); *Pyeatt*, *supra*.

⁷ *Bushey v. Plastic Fabricating Co.*, 213 Kan. 121, syl. 1, 515 P.2d 735 (1973).

The preliminary hearing statute was designed to expediently address issues of medical treatment and TTD.⁸ The preliminary hearing is summary in nature⁹ and evidentiary rules are relaxed, which aids in the prompt resolution of the issues.¹⁰ The need for an expedient resolution of the issues regarding TTD benefits is just as compelling following an award as it is before an award. In fact, the Act formerly provided that preliminary hearings may be held post-award while an award is on appeal.¹¹

The Board has held on numerous occasions that the preliminary hearing procedure may be used following an award. The 2000 legislature enacted a specific procedure for post-award requests for medical treatment, but that amendment did not address post-award requests for TTD benefits.¹² Recognizing the need for the expedient resolution of the issues surrounding TTD, the Board interprets the Act to allow the parties to litigate post-award requests for TTD as a preliminary hearing matter.

When a post-award preliminary hearing for TTD is held and a preliminary hearing order issued, the parties may request, if needed, a full hearing and final order on those issues. When submitting evidence for a final order, the more strict evidentiary rules apply and the parties may be required to submit their evidence by deposition, if they cannot otherwise agree.

Under that procedure, the post-award preliminary hearing orders are reviewable as any other preliminary hearing order. But the final orders that are issued are subject to de novo review by the Board, which is then subject to appellate court review.

Because the Board considers this an appeal from a preliminary hearing order, not every alleged error in law or in fact is reviewable. The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction.¹³ This includes review of the preliminary hearing issues listed in K.S.A. 44-534a(a)(2) as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term “certain

⁸ K.S.A. 44-534a(a)(1).

⁹ K.S.A. 44-534a(a)(2).

¹⁰ K.A.R. 51-3-5a.

¹¹ K.S.A. 2000 Supp. 44-551(b)(2)(C) and K.S.A. 1999 Supp. 44-556(g).

¹² 2000 Kan. Sess. Laws Ch. 160, New Section 4, now codified at K.S.A. 44-510k.

¹³ K.S.A. 44-551.

defenses” refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.¹⁴

Workers compensation judges have the jurisdiction at preliminary hearings to determine if an individual meets the definition of TTD.¹⁵ The judge has the power and jurisdiction to decide that question rightly or wrongly. But he must affirmatively decide one way or another and cannot refuse to make such a decision.

Here, the ALJ declined to address the issue of TTD, in spite of the fact that this Board has found that post-award requests for TTD may be handled as a preliminary hearing matter.¹⁶ That being the case, the Board finds the ALJ’s Order should be reversed and the matter is hereby remanded to the ALJ for a preliminary hearing on claimant’s request for TTD for the period from September 29, 2005 to June 7, 2006. In the event that benefits are awarded and no other agreement can be achieved between the parties, a full hearing should be held and the claimant’s Award should indeed be re-computed.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Bryce D. Benedict dated May 25, 2006, is reversed and the matter is remanded with directions to proceed on claimant’s request for post-award TTD benefits in a manner consistent with the above findings.

IT IS SO ORDERED.

Dated this _____ day of August, 2006.

BOARD MEMBER

c: Beth Regier Foerster, Attorney for Claimant
Kip A. Kubin, Attorney for Respondent and its Insurance Carrier

¹⁴ *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

¹⁵ K.S.A. 44-534a(a)(2).

¹⁶ *Morris v. Sabreliner*, No. 210,972, 2000 WL 1708346 (Kan. WCAB Oct. 31, 2000).